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No. 90-1732

In The

Supreme Court of the United States

October Term, 1990

ROBERT T. NICOLS,

Petitioner,

v.

LYNNE J. NICOLS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

- AND APPENDICES -

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TABLE OF CONTENTS

PAGE

INDEX OF AUTHORITIES ii

COUNTER-STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT:

I. THE WRIT OF CERTIORARI SHOULD BE DENIED FOR FAILURE TO PRESENT A FEDERAL QUESTION. 11

II. THE WRIT OF CERTIORARI SHOULD BE DENIED FOR FAILURE TO DEMONSTRATE A DENIAL OF PROCEDURAL OR SUBSTANTIVE DUE PROCESS. 12

CONCLUSION AND REQUEST FOR RELIEF 15

APPENDICES:

Appendix A – February 29, 1988 Letter from Mediator, Plaintiff's Exhibit 1 ..... A-1

Appendix B – June 22, 1988 Supplemental Report of Mediator B-1

INDEX OF AUTHORITIES

PAGE

CASES:

Beck v *Washington*, 369 US 541 (1962) 11

Grayson v *Harris*, 267 US 352 (1925) 13

Herb v *Pitcarin*, 324 US 117 (1945) 12

Hilley v *Hilley*, 140 Mich App 581, 364 NW 750 (1985) 12

Madden v *Madden*, 125 Mich App 54; 336 NW2d 231 (1983) 12

McCoy v *Shaw*, 277 US 302 (1928) 12

Michigan Bell Telephone Co v *Sfat*, 177 Mich App 506; 442 NW2d 720 (1989) 13-14

Murdock v *Memphis*, 20 Wall 590; 22 L Ed 429 (1875) 12

New York ex rel Bryant v *Zimmerman*, 278 US 63 (1928) 11

Norton Shores v *Carr*, 59 Mich App 561; 229 NW2d 848 (1975) 13

Stark v *Kent Products*, 62 Mich App 546; 233 NW2d 643 (1975) 12

Tinkle v *Tinkle*, 106 Mich App 423; 308 NW2d 241 (1981) 12

COURT RULE:

MCR 2.507(H) 12-13

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER-STATEMENT OF THE CASE

The account of proceedings set forth in petitioner's pleadings have not been accepted by any Michigan Court as a correct statement of facts. Respondent asserts the following is a correct view of the factual and procedural posture of this case.

Respondent's complaint for divorce, filed in 1985, sought dissolution of a 15-year marriage involving custody of two minor children, and millions of dollars of marital property. After years of pre-trial discovery, the trial court appointed attorney Robert Z. Feldstein as mediator. The *stipulated* order of mediation, entered October 1, 1986, provides:

> "Upon the Joint Motion of Counsel for Plaintiff and Defendant,
>
> IT IS HEREBY ORDERED that Robert Feldstein is hereby appointed mediator for the purpose of

meeting with the parties and their counsel in an attempt to settle all contested issues in this proceeding.

IT IS FURTHER ORDERED that the sole *mediator shall not be restricted by the procedures of GCR 316.1, but may use modified procedures which, in the judgment of the mediator, would be appropriate under the circumstances of this case.*

IT IS FURTHER ORDERED that upon completion of the mediation hearing, if a settlement has not been reached, the mediator shall file a written recommendation with the Court, which recommendation may be read by the Court for the purpose of assisting the Court in understanding the issues involved." (Petitioner's Appendix F) (Emphasis supplied)

There were several preliminary meetings between counsel and the mediator (Tr 206). On February 27, 1988, a Saturday, all counsel and their clients met with Mr. Feldstein (Tr 147). During that eight-hour session (Tr 148), the parties reached agreement on all issues (Tr 149). In the presence of both respondent and petitioner, and their attorneys, the mediator recited the terms of the agreement on dictating equipment (Tr 149) and inquired of each party whether they understood the settlement and agreed to its terms. In the presence of all, the mediator recorded the assent of each party to the agreement (Tr 150).

The mediator transcribed the agreement and submitted the six-page report recapitulating the terms of the settlement exactly as had been dictated, writing to the trial judge that there was "full agreement as to all issues in dispute" (Respondent's Appendix A, A-1).

That same day petitioner's counsel telephoned respondent's attorney requesting renegotiation (Tr 4).

Nevertheless, within a few days, petitioner's attorney reported his client would abide by the agreement (Tr 5). On March 7, 1988, the case was scheduled for trial and respondent's attorney reported to the judge the case had been settled (Tr 3/7/88, 2).

Petitioner was not present in court on that date. He later testified he had a business meeting (Tr 298). Respondent testified to the routine grounds for a Michigan divorce and indicated the mediator's transcription was accurate (with one minor acknowledged mathematical error) (Tr 3/7/88, 5). Petitioner's attorney, who *was* present, told the court:

> "Your Honor, it is my understanding that the parties will enter a settlement agreement separate from judgment, and it will be not part of the actual record, but copies of the agreement will be kept between the parties.
>
> The property settlement which is essentially outlines in Plaintiff's [Respondent's] Exhibit number One will actually be contained in a settlement, or a separation agreement.
>
> What the witness has in her hand, which is Mr. Feldstein's first draft, after the extensive mediation proceedings, is essentially an outline, a very complete outline without some enunciates and details that [the parties' counsel] have agreed will ultimately be included in the settlement agreement after judgment of divorce.
>
> *We have no objection to the exhibit being received.*" (Tr 3/7/88, 6-7) (Emphasis supplied)

Respondent's attorneys prepared a proposed judgment, but petitioner refused to sign it for entry. Petitioner's counsel prepared a draft of a proposed judgment (Tr 5),

and the trial court met with both counsel and suggested the mediator be called upon to review which proposed judgment accurately reflected the parties' settlement agreement (Tr 6). The mediator reported respondent's version was correct (Supplemental Report/Recommendation of Mediator, Respondent's Appendix B, B-2), but the trial court, nevertheless, conducted an evidentiary hearing to determine the basis of petitioner's objections to respondent's motion for entry of judgment.

At the beginning of the hearing, petitioner's counsel told the court that the mediator's report *was an accurate transcription of the parties' agreement:*

> "[THE COURT] . . . I guess my question is, did he [the mediator] record the whole agreement as it was stated or just their assent?
>
> [PETITIONER'S COUNSEL]: No. I believe, your Honor, that he recorded the whole agreement and, I believe, as recorded, the memorandum that he submitted to the Court is an accurate transcription of that.
>
> THE COURT: And both parties assented to that?
>
> [PETITIONER'S COUNSEL]: That is correct, your Honor. *And we don't take the position that we have not assented to that.*" (Tr 19) (Emphasis supplied)

As noted, the settlement agreement undertook to dispose of a marital estate of several million dollars. According to the essential terms of the property division, respondent was awarded the marital residence and most of its furnishings, a cash payment of $440,000 within six months of entry of judgment (Tr 160), and $1 million to be paid out over 10 years, plus 5% interest on the unpaid balance (Tr 162). Petitioner was awarded his several business concerns, worth approximately $2.5 million, a $3 million mansion in Bloomfield Hills, Michigan, a $2 million

home in Aspen, Colorado, his three foreign cars, about $300,000 in bearer bonds and other unregistered securities. The parties split petitioner's profit sharing plan equally. Alimony was reserved in the event he defaulted in the periodic payments.

At the evidentiary hearing, petitioner testified to his different understanding. There, he stated he thought the interest component on the $1 million payout was to be on the monthly payment, not the unpaid balance (Tr 278), and that he thought he only had to pay 65% of the sums agreed upon "after discounting for taxes" (Tr 281), prompting the trial judge to inquire, as follows:

> "THE COURT: Can I ask just one quick question to help us out? Who does that tax money go to?
>
> THE WITNESS: The government.
>
> THE COURT: Are you the government?
>
> THE WITNESS: No.
>
> THE COURT: Then why would you expect there would be a thirty-five-percent reduction on any payment that you're making?
>
> THE WITNESS: Because —
>
> THE COURT: Who's going to keep the thirty-five percent? Who is going to keep the thirty-five percent that you are keeping out of the payments? Who keeps it?
>
> THE WITNESS: I guess I do.
>
> THE COURT: So you're the government and you're collecting thirty-five percent on her payments?
>
> THE WITNESS: Oh, no. No. But I mean to be able to make the payment, I have to pay the government —"
>
> (Tr 281-282)

* * *

"THE COURT: Now, wait a minute. I'm going to be very serious about this.

THE WITNESS: Okay.

THE COURT: You're under oath.

THE WITNESS: Right.

THE COURT: I'm going to ask you to produce it.

THE WITNESS: Okay.

THE COURT: Have you ever paid a loan back in your entire life where the interest on the entire indebtedness, there was none, that the interest was only on the monthly principal payment? That's what you're suggesting here.

THE WITNESS: As a short period of time, no.

THE COURT: Talking about where there was no interest on the principal due but only interest on the monthly payment.

THE WITNESS: I need to call my accountant.

THE COURT: I don't think you probably ever have, Mr. Nicols. I don't think anybody ever has."

(Tr 312)

In his findings of fact on these two issues, the trial judge concluded that Feldstein's transcription of the agreement was clear in its understanding (Tr 333), that there was no fraud, coercion or mutual mistake (Tr 333), that petitioner entered into it after full consideration (Tr 334), and that "there was clearly an agreement" (Tr 337), but that petitioner's subsequent testimonial "interpretation" of the interest component and deduction for taxes was not credible:

"Now, with all due respect, any person of any average intelligence — and we're not talking about that here. Mr. Nicols, despite the delicately deni-

grating remarks of [defense counsel], is not a fool. He is not — not that you've said your client is a fool. But that he is not an inexperienced novice, he is a sophisticated businessman who has been extremely successful and is to be admired for that success. It's not something to be chastised for. But he understands dollars. He understands the term of payment and he understands the term one million dollars and he understands it's over and above aforedescribed cash payments. There's nothing in there that says it's alimony. And obviously he's paying her at that point in time for any interest she has in his estate, obviously. And it's what the monthly payments are. And then it's plus five percent interest thereon. And I'm sure — you know, it didn't say five percent per annum, it didn't say five percent a month or five percent a day. Common usage would say if you're going to buy something and what's the interest on it, it's ten percent, eight percent, ten, fifteen percent, common usage, business usage indicates that it is on a per annum basis, so obviously you're talking five percent per annum. You would have to accept [*sic*, most probably "except"] it in order to be anything different than that. I think you used the term 'incredible.' I don't think the Court said that. I think the Court said mind-boggling. And I think it is mind-boggling. With all due respect to Mr. Nicols, if he can sit here and think that he was going to reduce the payment of an interest in an estate by thirty-five percent can in no way, sh– first, I just don't believe it, frankly, and we make that as a finding. I just don't believe it. And, secondly, the language is crystal clear as to how it was to be done. There has been the testimony as to a discussion as to an amortization schedule, which is obvious. Mrs. Nicols wants to

> know how much she's going to get each month, how much she can anticipate five years from now, 'I'm going to be getting only X number of dollars.' So I am completely satisfied that there was an agreement entered into with full intelligence without any coercion. I find no coercion in that statement about he has one minute to decide, taking into consideration what the Court has said already about the amount of time, effort, and energy that had been expended up to that point. I find that argument without merit. That there was clearly an agreement." (Tr 336-337)

During the course of the hearing, other issues over which the Michigan trial court has continuing jurisdiction were raised by petitioner, such as whether the child visitation schedule meant weekly overnight visits during the school year (Tr 293-295), the extent to which he could decide which private school the children attended, and his participation in medical decisions affecting the children. Petitioner also questioned whether he was responsible for a $13,000 loan taken in his name alone, asked for specification of the furniture he was to receive from the marital home (Tr 293), and the amount of credit for prior payments of his wife's attorney fees, and which parent was to receive a dependency exemption for income tax purposes.

The trial judge noted the absence of a provision for overnight visitation during the week in the detailed schedule in the mediator's report (Tr 26), and ruled such a schedule would be too disruptive in any event (see Tr 31). He resolved holiday visitation questions (Tr 35), ruled petitioner was to consent to any elective medical procedures for the children (Tr 41-42), and ruled tax exemptions would alternate each year (Tr 49).

Petitioner wanted the word, "material" inserted, to describe "default," in the judgment provision reserving

alimony in the event he did not make the payments of the property division (Tr 62). The court urged the parties agree to a grace period in which to cure a default. Both sides accepted that alternative (Tr 65). Petitioner was allowed to specify which furniture and personal property he wanted (Tr 71-81; 90-91), and he agreed to vacate the residence by May 1, 1988 (TR 82). Petitioner received a credit against the attorney fee award for sums he had paid previously (Tr 113-116, 335), but was ordered to pay the outstanding loan balance taken out in his name alone (Tr 116-121, 335). Other minor language changes were allowed by the court, all at petitioner's insistence, further clarifying his rights and obligations.

In concluding his findings of fact, the trial judge construed his role in the hearing as "clarifying and interpreting" the parties' agreement"

> "I think I've said it, I'll repeat it again. Those matters were, in fact, questions of interpretation, questions of language, meaning, and the Court has interpreted it and gone through it and we have done that. The parties themselves, apparently, couldn't agree. The Court has assisted in that regard. The Court is not making the agreement. The Court is assisting in clarifying what that agreement is." (Tr 333)

The trial court granted respondent's motion for entry of judgment. The actual judgment has the handwritten notation "Default" written onto it.

Prior to entry of judgment, respondent's counsel discovered petitioner had recently re-mortgaged his Bloomfield Hills home for $1,500,000, in violation of injunctive orders, a secret transaction which jeopardized respondent's security interest in that property created in the judgment (Tr 353). As a consequence of this move by petitioner,

about which the trial judge found petitioner to have committed perjury (Tr 360), the court ordered the judgment to reflect additional protections for respondent (Tr 359). Judgment entered accordingly.

Petitioner appealed to the Michigan Court of Appeals which affirmed, holding the facts at the hearing supported the trial court's conclusion that there had been a "meeting of the minds" and a valid agreement, that petitioner was not credible in his claim of a mutual mistake, that the trial judge properly exercised discretion regarding child support, visitation, education and other matters and that the clerical mislabeling of the judgment as a "default" was of no consequence. The Michigan Supreme Court denied all petitioner's attempts for discretionary review.

Throughout this appellate litigation the only assertion by petitioner of a federal or constitutional right is contained in the following passage of his principal brief in the Michigan Court of Appeals:

> "Under these circumstances a default judgment was not properly entered. Letting the judgment stand would not only violate applicable court rules but would constitute a violation of [petitioner's] constitutional rights to due process. US Const, Am XIV; [Michigan] Const 1963, Art I, Section 17." (Petitioner's Michigan Court of Appeals Brief, p. 17)

Petitioner's Application for Leave to Appeal with the Michigan Supreme Court did not seek to expand that contention, no Michigan or federal decision was cited to either state court for that proposition, and neither the Michigan Court of Appeals nor Supreme Court ruled on a federal question.

REASONS FOR DENYING THE WRIT

I.

THE WRIT OF CERTIORARI SHOULD BE DENIED FOR FAILURE TO PRESENT A FEDERAL QUESTION.

Respondent contends the single sentence in petitioner's 34-page appellate brief in the state appellate court, contending for the first time that he was denied a trial in violation of due process clauses of the Michigan and federal constitutions, is insufficient to present a substantial federal question. See *New York ex rel Bryant* v *Zimmerman*, 278 US 63, 67-68 (1928); *Beck* v *Washington*, 369 US 541, 553 (1962).

Petitioner's argument has been that he was entitled to a trial, but that is a conclusion with which no Michigan Court would have disagreed, *had it not been for the factual determination that he settled his case* on the very day trial was scheduled to begin. His assertion that the state denied him a federal right to trial when he chose not to appear in court on the trial date and his attorney told the judge the case was settled, should be deemed to have a hollow ring to it.

Accurately perceived, the record shows the factual conclusions of both the trial court and state appellate court that petitioner's claims about this case are not credible. In fact, he settled. In fact, both he and his lawyer told the judge the Feldstein memo was an accurate transcription of that agreement. In fact, petitioner was accommodated by the trial judge, several of his concerns were raised and resolved in his favor. In fact, no Michigan Court has decided a federal question. Respondent submits petitioner has not demonstrated grounds consistent with Supreme Court Rule 10.

The decision of the state courts rests on adequate and independent state grounds. Michigan law encourages settle-

ment of divorce litigation, *Hilley* v *Hilley*, 140 Mich App 581; 364 NW2d 750 (1985); *Madden* v *Madden*, 125 Mich App 54; 336 NW2d 231 (1983); *Tinkle* v *Tinkle*, 106 Mich App 423; 308 NW2d 241 (1981). A local court rule requires a settlement agreement to either be written and signed by the parties or counsel, or acknowledged in open court. MCR 2.507(H). Petitioner's challenge below was that there was no meeting of the minds essential to such an agreement. However, the state courts have measured petitioner's credibility, found the written evidence of the agreement, which petitioner acknowledged as his, to be clear and capable of understanding, and found there was a settlement by looking to the express words of the parties and their visible acts. *Stark* v *Kent Products*, 62 Mich App 546, 548; 233 NW2d 643 (1975).

Since this case was decided purely on issues of state law and findings of fact supported by the evidence, this Court should deny the writ because no Michigan Court was presented with a federal issue and none ruled on one, directly or by inference. *Herb* v *Pitcarin*, 324 US 117, 125-126 1945); *Murdock* v *Memphis*, 20 Wall 590; 22 L Ed 429 (1875); *McCoy* v *Shaw*, 277 US 302 (1928).

II.

THE WRIT OF CERTIORARI SHOULD BE DENIED FOR FAILURE TO DEMONSTRATE A DENIAL OF PROCEDURAL OR SUBSTANTIVE DUE PROCESS.

Respondent finds it necessary to dispute petitioner's assertion "that no (settlement) agreement was made in open court" (Petition for Writ of certiorari, p. 19). Both the trial court and the Michigan Court of Appeals found as a matter of fact the parties had complied with the state court rule governing settlement agreements, MCR 2.507(H):

> "In the instant case on the date scheduled for trial, counsel for the defendant advised the court that the parties had reached a settlement in accordance with the terms contained in the mediation 'memorandum of agreement.' Indeed, at the evidentiary hearing held in August 1988, defendant did not deny that an agreement had been reached by the parties through mediation, but merely disputed some of the terms and stated that he misunderstood the tax consequences. Defendant acknowledged that he had agreed to the major provisions of the property settlement: that he had agreed to pay to plaintiff $1 million over 10 years; a $440,000 payment to plaintiff; and a $175,000 payment for her attorney fees. We therefore conclude that the property settlement agreement between the parties, as outlined in the mediation memo, was binding on the parties, and defendant's argument that any purported stipulation was revoked is without merit." (Court of Appeals' Opinion, Petitioner's Appendix p. C-4)

Respondent submits such findings of fact are not subject to review. *Grayson* v *Harris*, 267 US 352, 358 (1925).

Petitioner's claim that he could revoke his settlement, and his citation to *Norton Shores* v *Carr*, 59 Mich App 561; 229 NW2d 848 (1975) does not correctly state Michigan law. *Michigan Bell Telephone Co* v *Sfat*, 177 Mich App 506, 515-516; 442 NW2d 720 (1989) explains:

> "An agreement or consent made in open court by the parties or their attorneys is binding on the parties. MCR 2.507(H). A party cannot, after agreeing in open court, refuse to sign a proposed judgment which accurately incorporates the agreement unless there was mistake, fraud, or unconscionable advantage which would justify setting aside the settle-

> ment agreement. *Meyer* v *Rosenbaum*, 71 Mich App 388; 248 NW2d 558 (1976). Defendant relies on *City of Norton Shores* v *Carr*, 59 Mich App 561; 229 NW2d 848 (1975), in furtherance of his position. That case appears to hold that a litigant is free to revoke a consent judgment between the time it is orally placed on the record and the time the judgment is actually entered by the court. To the extent that *Norton Shores* stands for that proposition, we join those cases which have since unanimously rejected its apparent holding. See, e.g., *Siegel* v *Spinney*, 141 Mich App 346, 349; 367 NW2d 860 (1985); *VanWagoner* v *VanWagoner*, 131 Mich App 204, 212-213; 346 NW2d 77 (1983); *Michigan Nat'l Bank of Detroit* v *Patmon*, 119 Mich App 772, 777-778; 327 NW2d 355 (1982); *Meyer*, *supra*, pp 392-393. This is not a situation where an attorney enters into a consent agreement without the approval of the party. See *Patmon*, *supra*, pp 776-777."

Thus, *Norton Shores* has been effectively overruled.

Moreover, the changes and additions in the ultimate judgment, which are different from the mediation report, were brought about by petitioner at the evidentiary hearing, and inure to his benefit. Petitioner has had all the process that is due.

The resulting division of property effected by the Court, through the parties' settlement, is not arbitrary or capricious, and does not amount to a denial of substantive due process. This was not a case where an unsophisticated litigant was coerced to accept the terms of a complex financial settlement without full understanding. Petitioner, a successful businessman, a multi-millionaire, acknowledged he had agreed to pay his wife a million dollars within 10 years but testified under oath that he didn't understand the

5% interest rate was to be charged on the unpaid balance; and he said he thought he only had to pay 65% of the other amounts he agreed to pay.

During the years of trial court litigation, petitioner was shown to have secreted assets, gave untruthful interrogatory answers, and has vowed his wife will receive "not one dime" of the marital estate or the terms of his own agreement. After all Michigan Courts repeatedly denied petitioner a stay of proceedings, he hired new counsel to file bankruptcy for him, in order to stay the judgment. There, as a debtor in possession, he listed his assets were worth millions more than before. Under the terms of his settlement, petitioner will receive substantially less than 50% of the marital estate.

It is obvious that petitioner has no basis for complaint and that his property rights were safeguarded by the Michigan Courts, both procedurally and substantively.

CONCLUSION AND REQUEST FOR RELIEF

Wherefore, Respondent, Lynne J. Nicols, respectfully requests this Honorable Court deny the Writ of Certiorari to the Michigan Supreme Court.

Respectfully submitted,

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DATED: May 10, 1991

APPENDICES TO BRIEF IN OPPOSITION

• • •

APPENDIX A

FEBRUARY 29, 1988 LETTER FROM MEDIATOR
(Plaintiff's Exhibit 1)

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Hon. Gene Schnelz
Oakland County Circuit Judge
1200 North Telegraph Road
Pontiac, Michigan 48053

February 29, 1988

RE: Nicols, Lynne v. Robert
Civil Action No. 85-290 611-DM

Dear Judge Schnelz:

I am most pleased to report to you that the Mediation Hearing which I conducted on Saturday, February 27, 1988 from 9:30 A.M. until almost 6:00 P.M. resulted in full agreement as to all issues in dispute.

Enclosed herewith the Court will find a Memorandum which recapitulates the terms and provisions of the agreement reached with the considerable assistance of attorneys Blank and Lowenthal for the Plaintiff and attorneys Carson and Cole-Pierce for Defendant. The Memorandum was dictated in the presence of both Mr. and Mrs. Nicols and placed upon the tape which recorded that portion of the proceeding.

It is my understanding that counsel will, in the very near future, accomplish such clarification or refinement of these terms and conditions as may be necessary so that a pro-

posed Judgment of Divorce and related Qualified Domestic Relations Order might be prepared, approved and presented for entry at Court at such time as the Plaintiff offers proofs relative to the jurisdictional and other statutory requirements.

In view of the length of the Saturday proceeding and the complexity of the issues confronted, the Memorandum is no doubt unavoidably phrased in rather clumsy and/or rambling fashion, but it will, I am confident, substantially assist counsel in their preparation of the required Judgment.

I am pleased to have been able to assist the Court, litigants and their counsel in disposing of this very long-pending action.

Extending best personal regards, I remain,

Very truly yours,

RZF:pmb Robert Z. Feldstein

Enc.

cc: Mr. Charles E. Blank and
Ms. Betty L. Lowenthal
Attorneys for Plaintiff
(Copy of Memorandum enclosed)

Mr. Robert M. Carson and
Ms. Anne Cole-Pierce
Attorneys for Defendant
(Copy of Memorandum enclosed)

Bruce O. Wilson, Esq.
Co-Counsel for Plaintiff

Joseph Cunningham, C.P.A.
Don B. Gill, C.P.A.

APPENDIX B

SUPPLEMENTAL REPORT/RECOMMENDATION OF MEDIATOR

(State of Michigan – Circuit Court – County of Oakland)

(Dated June 22, 1988)

(LYNNE J. NICOLS, Plaintiff, -vs- ROBERT T. NICOLS, Defendant — Civil Action No. 85-290 611-DM)

This matter was submitted to Mediation which was conducted February 27, 1988 from 9:30 A.M. until 6:00 P.M., resulting in what the Mediator understood to be a full agreement as to all issues in dispute, as memorialized by a certain Memorandum of that date, copies of which were provided the Court and counsel of record with transmittal correspondence of February 29, 1988.

Subsequent thereto the Mediator met with counsel for the respective parties, at the Court's request, at the Oakland County Circuit Court House on May 18, 1988.

Thereafter, the Mediator has received from counsel for the respective parties differing proposed Judgments of Divorce, accompanied by cover correspondence evidencing the Court's desire that these respective versions of proposed Judgments be reviewed by the Mediator toward the end of submission of a report/commentary to the Court.

The following constitutes that "commentary" and is issued as the Supplemental Report/Recommendation of Mediator.

1.

PREFERRED VERSION OF PROSPECTIVE JUDGMENT

After reviewing the Memorandum of Agreement, dated February 27, 1988, and reflecting upon the discussion

and/or agreement occurring at the jury room of the Hon. Gene Schnelz May 18, 1988, and after a comparative review of the proposed Judgments, it is the Mediator's determination that the version prepared by counsel for Plaintiff, LYNNE J. NICOLS, is in conformity with that which was earlier agreed to, as clarified May 18, 1988 and as further modified by some post-mediation agreements obviously reached by and between the parties and their respective counsel, as incorporated in the proposed Judgments. The Mediator would, upon the basis of the foregoing, further determine that the Amortization Schedule attached to Plaintiff's proposed Judgment as Exhibit A, fairly and accurately reflects the property settlement payout obligation (principal and interest) owed by Defendant to Plaintiff.

II.

ENUMERATION OF THE MATERIAL ERRORS, OMISSIONS OR MISSTATEMENTS IN DEFENDANT'S PROPOSED JUDGMENT UPON WHICH THE MEDIATOR'S FOREGOING DETERMINATION WAS REACHED THAT THE PLAINTIFF'S PROPOSED JUDGMENT OUGHT TO BE ADOPTED

VISITATION

Pages 3-4 – Overnight visitation has improperly been inserted in subparagraphs B and C.

MEDICAL, DENTAL, ETC. FOR MINOR CHILDREN

Page 5 – The need for Plaintiff to secure the consent of Defendant as to elective medical procedures has been improperly inserted.

DEPENDENCY DEDUCTION FOR CHILDREN

Page 6 – This tax privilege improperly inserted.

PRIVATE SCHOOL EXPENSE

Page 6 – The choice of private school by Defendant has been improperly inserted.

ALIMONY

Page 6 – The word "material" has been improperly inserted as to Plaintiff's right to invoke the reservation of alimony clause.

PROPERTY SETTLEMENT

Page 9 – "Furniture in the den" has improperly been inserted in subparagraph B, and the previously-agreed upon date of vacating of premises by Defendant has been erroneously extended.

Page 10 – Language in subparagraph C 1) relative to "credits" not agreed to and improperly inserted.

Subparagraph D improperly incorporates a reference to "tax effects" and a subsequent paragraph 17 H which has been, in its entirety, improperly incorporated, and further this subparagraph erroneously sets forth the interest rate as applicable to "each payment" rather than as to the unpaid balance.

Page 12 – The top paragraph seems to ambiguously and/or duplicatorily deal with what would constitute "net sales proceeds".

Subparagraph F adopts a division date of February 27, 1988 relative to distribution of Profit Sharing Trust balances while, in view of the significant passage of time for Mediation, date of entry of Judgment would be more equitable.

Page 13 – Subparagraph 17 H never agreed to and not incorporated in Mediator's Memorandum of Agreement and should be stricken in its entirety.

Page 16 – Subparagraph I inequitably utilizes date of February 27, 1988 in view of passage of time since Mediation with date of entry of Judgment to be preferred.

Subparagraph J – No agreement was reached, nor does the Memorandum contemplate, any "credit against payments due Plaintiff-Wife," with the Mediator puzzled as to what is meant by this subparagraph.

Page 17 – Top paragraph (part of paragraph 19) refers to the "repayment of debt," while the Memorandum of Agreement reached following the initial and lengthy Mediation simply referred to "legitimate household, family or business expenditures."

COUNSEL/EXPERT WITNESS FEES AND COSTS

Page 20 – The final two sentences of this provision would, in view of the fact that they did not constitute part of the agreement earlier reached, require deletion.

SECURITY AND INJUNCTIVE PROVISIONS

Page 20 – The bottom line would suggest that the word "not" has been inadvertently omitted and should be inserted between the words "shall" and "directly."

Page 21 – The last three words on the bottom of Page 21 and the remaining portion of the provision at the top of Page 22 should be deleted, not having been earlier agreed upon at Mediation.

Page 22 – Paragraph 31 – The Receiver's duties to engage in "proper marketing activities," while perhaps an ultimately beneficial requirement was not agreed upon at the time of Mediation and may, in view of the language chosen, pose such ambiguity as to create additional problems.

III.

MEDIATOR'S OPPOSITION TO ATTENDANCE AT HEARING AND/OR OFFERING OF TESTIMONY

It is respectfully submitted that, as a quasi-judicial officer, the Mediator may not, despite the transmittal correspondence of respective counsel, appear as a witness at any hearing, interpretative or otherwise, with this Supplemental Report/Recommendation of Mediator submitted for the consideration of the Court and respective counsel in lieu thereof and as a final effort on the part of the Mediator to resolve discrepancies between the proposed versions

of Judgment of Divorce and the Memorandum of Agreement earlier circulated in this cause and the subsequent Court House conference hereinbefore described.

Respectfully submitted

ROBERT Z. FELDSTEIN, P.C.
Court-Appointed Mediator

Dated: June 22, 1988